Nadarajan s/o Verayan v Hong Tuan Teck (Part 2)

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R–17B–18 OF 2005
ABDUL MALIK ISHAK, T SELVENTHIRANATHAN AND MOHD HISHAMUDIN JJ
16 MARCH 2007

Legal Profession — Disciplinary proceedings — Disciplinary Committee — Advocate and Solicitor struck off the Roll — Appeal to High Court — Appeal out of time — Whether court empowered to enlarge time — Burden on appellant to show why extension of time ought to be allowed — Whether appellant discharged burden on balance of probabilities — Service of appeal record on Director of the Complaints Secretariat — Whether service properly effected on Disciplinary Board — Effect of failure to serve cause papers on Disciplinary Board — Whether service of cause papers/appeal record on Disciplinary Board required — Whether Disciplinary Board had locus to participate in proceedings

There were two enclosures fixed for adjudication before the honourable court, viz the appellant's notice of appeal (encl 1) and the application in encl 4 seeking for inter alia, (1) that time be extended for the appellant to appeal against the decision of the Disciplinary Board made on the 31st March, 2005 ordering that the appellant be struck off the Roll of Advocates and Solicitors of the High Court of Malaya; and (2) that the Notice of Appeal lodged by the Appellant be deemed valid. At the commencement of the hearing, a preliminary objection was raised by the appellant, namely, that the Disciplinary Board ('DB') had no locus standi to participate in the hearing before the Honourable Court. Counsel for the appellant argued that there were no provisions in the Legal Profession Act 1976 ('LPA') to allow the DB to intervene and that if the legislature had intended to vest the DB with the powers to intervene, there would be provisions in the LPA similar to that of s 103E(4) of the LPA. It was also submitted that the DB cannot intervene at any stage of the present appeal. Learned counsel for the appellant also pointed out that (a) the DB, if at all it was served, which was denied was nothing more than 'a person served' and that the DB was not and can never be 'a party served'; (b) mere service of the cause papers cannot make the DB a party to the proceedings; (c) the DB was not served with the notice of appeal and cause papers; and (d) the DB in exercising its statutory function under the LPA, was in fact exercising a judicial function and that judicial function was in the nature of performing a judicial act. The learned counsel for the DB on the other hand argued that: (a) the DB was intervening on the basis of being 'a party served'; and (b) it had been served with the cause papers and therefore it was a party to the proceedings.

Held, dismissing prayers (1) and (2) of encl 4 with costs and dismissing the appeal in encl 1:

(1) There was no merit in the present application for an extension of time.

Based on the documentary evidence, the appellant at all material times had knowledge of the disciplinary proceedings against him but had refused to attend the hearing of the same. The appellant was also duly notified of the decision of the DB (see paras 28–29).

(2) Service of the appeal record to the Director would mean service to the DB. It must be borne in mind that the Director of the Complaints Secretariat was the secretary to the DB by virtue of r 2 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 (see para 22).

(3) The appeal in this case concerned the legal profession which attracted public interest. Because it was the DB that made the decision now under appeal, the DB's presence in court would certainly be of assistance to this court. The DB was in a position to bring forth any relevant and admissible evidence that may arise in the course of hearing this appeal. As the governing body for the discipline of Advocates and Solicitors, the participation of the DB in this appeal would certainly assist this court in arriving at a just decision. We were certainly entitled to allow the DB to participate in these proceedings and to be present through the representation of Mr Su Tiang Joo as a friend of the court (see para 24); *Squibb United Kingdom Staff Association v Certification Officer* [1979] 2 All ER 452 followed.

(4) Once notified of the decision or order of the DB, the aggrieved party has the right of appeal to the High Court within one month of the date of the notification. Prima facie, the appellant's appeal in encl one lodged on 16 May 2005 was out of time. There is no provision in the LPA for the court to enlarge time for this purpose (see para 26).

(5) Notwithstanding the fact that *Lily Rossel Sebastian* held that the RHC was applicable by virtue of r 11 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, yet certain factors have to be taken into account in deciding whether to extend time because that power is entirely and purely discretionary in nature (see para 28).

(6) In construing s 101(4) of the LPA, it would be appropriate to make reference to s 12 of the Interpretation Acts 1948 and 1967 (Act 388). Thus, when a document is required to be served by post it shall be presumed to be posted effectively; (a) by properly addressing, prepaying and posting by registered post the letter containing the document; and (b) when the letter would have been delivered in the ordinary course of the post. These two presumptions are rebuttable on the balance of probabilities and it falls on the appellant to rebut these two presumptions. Sadly, the appellant failed to do so (see para 32).

(7) The appellant knew of the disciplinary proceedings but he purposely chose not to present himself at the hearing. The appellant's argument that he was not aware of the proceedings both before the IT and the DC was unsustainable bearing in mind the overwhelming evidence that was presented before this court. Whilst the appellant was quick to say that he had moved from time to time, yet there was no evidence led by him to show that he had informed the Bar Council of his change of residential address. Moving from one place to another, cannot absolve the appellant from blame (see paras 34 & 37).

(8) It was the appellant's duty, burden having shifted to him, by virtue of s 12 of the Interpretation Acts 1948 and 1967, to show to this court as to why the extension of time for the appellant to pursue his appeal ought to be allowed. He had failed to discharge that burden on the balance of probabilities. He too has lodged an appeal out of time and enlargement of time should not be accorded to him. It appeared to us that he was not interested in attending the scheduled hearing dates before the IT and the DC (see para 37).

(9) It was crucial to the appellant to be allowed to extend time to pursue his appeal. The unanimous decision of this court to refuse to extend time for the benefit of the appellant would mean that his appeal ought to be dismissed forthwith. That would have ended the matter, once and for all (see para 38).

(10) It can be argued that the requirement of s 109 of the LPA would depend entirely on the discretion of the IT or the DC. If the IT or the DC was satisfied that due notice had been given to the appellant, it can dispense with such requirement. At any rate, even if proof was required, it would be that as required by this court (see para 50).

(11) The chronology of events as alluded to, together with the affidavit of Tomis anak Peter Samat in encl 12 would amply show that the notices of the hearings before the IT and the DC were indeed served on the appellant (see para 50).

[Bahasa Malaysia summary

Terdapat dua lampiran ditetapkan untuk diputuskan dihadapan Mahkamah yang Mulia, yakni Notis Rayuan Perayu (Lampiran 1) dan permohonan dalam Lampiran 4 memohon untuk antara lain; (1) bahawa masa dilanjutkan untuk perayu merayu terhadap keputusan Lembaga Disiplin yang dibuat pada 31 Mac 2005 yang memerintahkan perayu dibatalkan daripada Daftar Peguambela dan Peguamcara Mahkamah Tinggi Malaya; dan (2) bahawa notis rayuan yang dimasukkan oleh perayu adalah sah. Semasa permulaan pendengaran, bantahan awal telah dibangkitkan oleh perayu, iaitu, bahawa Lembaga Disiplin ('LD') tiada locus standi untuk mengambil bahagian dalam pendengaran di hadapan Mahkamah yang Mulia. Peguam untuk perayu mempertikaikan bahawa tidak ada peruntukkan dalam Akta Profesyen Undang-undang 1976 (APU) yang membenarkan LD untuk mencelah dan jika badan perundangan meniatkan untuk memberikan kuasa kepada LD untuk mencelah, mesti ada peruntukkan dalam APU yang bersamaan dengan s 103E APU. Adalah juga dihujahkan bahawa LD tidak boleh mencelah pada mana-mana bahagian rayuan ini. Peguam perayu yang terpelajar juga menekankan bahawa: (a) LD, jika ia telah disampaikan sekalipun, yang mana dinafikan adalah tidak lebih daripada 'orang yang diserahkan' dan bahawa LD tidak boleh dan tidak akan menjadi 'pihak yang diserahkan'; (b) dengan hanya menyampaikan kertas-kertas kausa tidak membolehkan LD menjadi pihak dalam prosiding; (c) LD tidak pernah diserahkan dengan notis rayuan dan kertas-kertas kausa; dan (d) LD dalam mengamalkan fungsi berkanun di bawah APU adalah pada faktanya mengamalkan fungsi kehakiman dan jenis fungsi kehakiman yang melaksanakan tindakan kehakiman. Peguam terpelajar bagi pihak LD pada masa yang sama berhujah bahawa: (a) LP telah mencelah dengan alasan kerana menjadi 'pihak yang diserahkan'; dan (b) ia telah diserahkan dengan kertas-kertas kausa dan oleh itu ia merupakan pihak dalam prosiding.

Diputuskan, menolak permohonan-permohonan (1) dan (2) Lampiran 4 dengan kos, menolak rayuan dalam lampiran satu:

(1) Tiada merit dalam permohonan ini untuk lanjutan masa. Berdasarkan keterangan dokumentar, perayu pada stiap masa matan mempunyai pengetahuan tentang prosiding tatatertib terhadapnya tetapi enggan hadir untuk perbicaraan tersebut. Perayu juga telah diberitahu tentang keputusan LD (lihat perenggan 28–29).

(2) Serahan rekod rayuan kepada Pengarah bermakna serahan kepada LD. Iaharus diingat bahawa Pengarah Sekretariat Aduan merupakan setiausaha LD menurut k 2 Kaedah-Kaedah Profesyen Undang-Undang (Prosiding-Prosidng Disiplin) (Rayuan) 1994 (lihat perenggan 22).

(3) Rayuan dalam kes ini melibatkan profesyen undang-undang yang menarik perhatian kepentingan orang awam. Oleh kerana LD yang membuat keputusan yang mana juag merupakan rayuan ini, kehadiran LD di mahkmah sudah tentu akan dapat membantu mahkamah ini. Kedudukan LD adalah untuk membawa sebarang keterangan relevan dan boleh diterima yang mungkin timbul semasa pendengaran rayuan ini. Sebagai badan yang menentukan disiplin Peguambela dan Peguamcara, penglibatan LD dalam rayuan ini sudah tentu akan membantu mahkamah mencapai keputusan yang adil. Kami sudah tentu membenarkan LD untuk melibatkan diri dalam prosiding-prosiding ini dan untuk hadir melalui kehadiran Mr Su Tiang Joo sebagai rakan mahkamah (lihat perenggan 24); *Squibb United Kingdom Staff Association v Certification Officer* [1979] 2 All ER 452 diikut.

(4) Selepas dimaklumkan dengan keputusan dan perintah LD, pihak yang tertindas mempunyai hak untuk merayu kepada Mahkamah Tinggi dalam tempoh satu bulan daripada tarikh pemberitahuan. Prima facie, rayuan perayu dalam Lampiran satu yang dimasukkan pada 16 Mei 2005 adalah di luar tempoh masa. Tiada peruntukkan dalam APU untuk mahkmah melanjutkan masa bagi tujuan ini (lihat perenggan 26).

(5) Walaupun fakta bahawa *Lily Rossel Sebastian* memutuskan bahawa KMT adalah terpakai mengikut k 11 Kaedah-Kaedah Profesyen Undang-undang (Prosiding-Prosiding Disiplin) (Rayuan) 1994, tetapi beberapa faktor harus diambil kira apabila memutuskan sama ada melanjutkan masa kerana kuasa ini pada keseluruhannya dan secara jelasnya hanyalah bersifat budi bicara (lihat perenggan 28).

(6) Dalam menafsirkan s 101(4) APU, ia adalah wajar untuk merujuk kepada s 12 Akta Tafsiran 1948 dan 1967 (Akta 388). Oleh itu, apabila dokumen diperlukan untuk diserahkan dengan pos ia diandaikan akan dipos dengan berkesan (a) dengan alamat yang betul; membuat bayaran dahulu dan mengepos dengan pos berdaftar surat yang mengandungi dokumen; dan (b) apabila surat akan diserahkan dalam keadaan biasa pos. Dua andaian ini boleh dipatahkan atas imbangan kebarangkalian dan ia terletak kepada perayu untuk menyangkal kedua-dua andaian ini. Malangnya, perayu gagal berbuat demikian (lihat perenggan 32).

(7) Perayu mengetahui prosiding disiplin tetapi beliau sengaja tidak menghadirkan dirinya semasa pendengaran. Pertikaian perayu bahawa beliau tidak

mengetahui kedua-dua prosiding dihadapan IT dan DC adalah tidak boleh dipertahankan mengambil kira keterangan yang banyak dibentangkan di hadapan mahkamah ini. Ketika perayu dengan cepat mengatakan bahawa beliau telah berpindah dari masa ke semasa, tetapi tidak ada keterangan yang dibawa olehnya bagi menunjukkan bahawa beliau telah memaklumkan Majlis Peguam pertukaran alamat kediamannya. Berpindah dari satu tempat ke satu tempat yang lain, tidak dapat mengelakkan perayu dari terus dipersalahkan (lihat perenggan 34 & 37).

(8) Adalah menjadi kewajipan perayu, beban telah berpindah kepadanya, mengikut s 12 Akta Interpretasi 1948 dan 1967 (Akta 388) untuk menunjukkan kepada mahkamah ini mengapa perlanjutan masa untuk perayu meneruskan rayuannnya mesti dibenarkan. Beliau telah gagal untuk melepaskan beban berdasarkan imbangan kebarangkalian. Beliau juga telah memasukkan rayuan diluar masa dan perlanjutan masa tidak sepatutnya diberikan kepadanya. Ia menunjukkan kepada kami bahawa beliau tidak berminat untuk menghadirkan diri kepada pendengaran yang telahpun ditetapkan di hadapan IT dan DC (lihat perenggan 37).

(9) Ia adalah penting kepada perayu untuk dibenarkan melanjutkan masa bagi meneruskan rayuannya. Keputusan sebulat suara mahkamah ini enggan memberikan perlanjutan masa bagi manfaat perayu bermakna rayuannya akan ditolak dengan segera. Ia akan menamatkan perkara ini, untuk selama-lamanya (lihat perenggan 38).

(10) Ia boleh dipertikaikan bahawa keperluan s 109 APU bergantung sepenuhnya kepada budi bicara IT atau DC. Jika IT atau DC berpuas hati bahawa notis secukupnya telah diberikan kepada perayu, ia boleh mengenepikan keperluan tersebut. Pendeknya, jika bukti diperlukan sekalipun, ia akan menjadi sepertimana keperluan mahkamah ini (lihat perenggan 50).

(11) Kronologi peristiwa-peristiwa sepertimana yang telah disebutkan, bersama-sama dengan affidavit Tomis anak Peter Samat dalam lampiran 12 akan menunjukkan secukupnya bahawa notis-notis pendengaran di hadapan IT dan DC telahpun diserahkan kepada perayu (lihat perenggan 50).]

Notes

For cases on disciplinary proceedings, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1589–1590.

Cases referred to

Chan Chow Wang v Law Society of Singapore (1978-1979) 1 SLR 14 (refd)

Lily Rossel a/p Sebastian lwn Pushpam a/p Subramaniam dan satu lagi [2003] 3 MLJ 223 (refd)

Lim Kiap Khee; Law Society of Singapore, Re v Lim Kiap Khee [2001] 3 SLR 616 (refd)

Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff bin Mohamed [1997] 2 MLJ 271; [1997] 3 CLJ 332 (refd)

Nadarajan s/o Verayan v Hong Tuan Teck (No 1) [2005] 6 AMR 228 (refd)

Saeed U Khan v Lee Kok Hooi [2001] 5 MLJ 416 (refd)

Selvamary v Rethinasamy [1991] 1 MLJ 156 (refd)

Squibb United Kingdom Staff Association v Certification Officer [1979] 2 All ER 452 (refd)
Tai Choi Yu v Ian Chin Hon Chong [2002] 5 MLJ 518 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 (refd)
TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow [1996] 4 MLJ 567 (refd)
TSC Education Sdn Bhd v Kolej Yayasan Pelajaran Mara & Anor [2002] 5 MLJ 577 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 14(1)
Interpretation Acts 1948 and 1967 s 12
Legal Profession Act (Singapore) (Cap 161, 1994 Ed) s 104
Legal Profession Act 1976 ss (3)(a), 93, 98, 101(4), 103E(1) & (4), 109, 111
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 r 12, 20
Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 r 2, 3(3), 5
Rules of the High Court 1980 O 15 r 6, 6(2)(b)

V Manoharan (Chong Phow Yew with him) (Messrs Nordin Torji & Partners) for the appellant.

Su Tiang Joo (Michelle SP Ong with him) (Messrs Cheah Teh & Su) for the Advocates and Solicitors Disciplinary Board and as amicus curiae.

Abdul Malik Ishak J (now JCA):

INTRODUCTION

[1] There were two enclosures for adjudication before us. The first would be encl 1 and it can be seen in the appeal record at p 15 thereof. The second would be encl 4.

[2] Enclosure 1 was the appellant's notice of appeal and it was worded in this way:

> NOTICE OF APPEAL
>
> TAKE NOTICE that the appellant abovenamed being dissatisfied with the decision of the Disciplinary Board at Kuala Lumpur given on the 31st March, 2005, appeals to the High Court against the whole of the said decision.
>
> Dated the 16 day of May 2005

[3] By way of encl 4, the appellant sought for the following orders:

(1) that time be extended for the abovenamed appellant to appeal against the decision of the Disciplinary Board made on the 31st March, 2005 ordering that the appellant be struck off the Roll of Advocates and Solicitors of the High Court of Malaya;

(2) that the notice of appeal lodged by the abovenamed appellant herein be deemed valid;

(3) pending hearing of the appeal lodged herein the aforesaid order of the Disciplinary Board dated the 31st March 2005 against the appellant be stayed;

(4) costs in the cause; and

(5) such further order or relief as this Honourable Court deems fit.

[4] I had, on 24 June 2005, sitting alone granted the order to stay the striking off the Roll of the appellant in accordance to prayer 3 of encl 4 and a written judgment has been rendered and it has since been reported vide *Nadarajan s/o Verayan v Hong Tuan Teck (No 1)* [2005] 6 AMR 228 (hereinafter referred to as the 'first judgment').

PRELIMINARY OBJECTION — THE LOCUS STANDI ISSUE

[5] There was a preliminary objection raised by the appellant. It was this. That the Disciplinary Board ('DB') had no locus standi to participate in the hearing before us. In the first judgment, when I sat alone, Mr Su Tiang Joo and Miss Michelle SP Ong from Messrs Cheah Teh & Su appeared for the DB and they appeared before me 'as a friend of the court' (see p 235 of the AMR reporting of the first judgment).

[6] Amicus curiae would be the correct terminology to describe Mr Su Tiang Joo. That would also be the terminology to describe Miss Michelle S P Ong. They both appeared for the DB and they assisted this court immensely. Two authorities must be highlighted here. One would be the case of *Tai Choi Yu v Ian Chin Hon Chong* [2002] 5 MLJ 518, a decision of Sulaiman Daud JC (now judge). The other is the case of *TSC Education Sdn Bhd v Kolej Yayasan Pelajaran Mara & Anor* [2002] 5 MLJ 577. Both these two authorities adverted to the meaning of the Latin phrase 'amicus curiae'. In *Tai Choi Yu* at p 523 to p 524, the learned judicial commissioner (now J) aptly said of that Latin phrase in these words:

> Who is an amicus curiae? In P Ramanatha Aiyar's *The Law Lexicon* (2nd Ed, 1997), amicus curiae is defined as a friend of the court, being a person who voluntarily or on invitation of the court, and not on the instruction of any party helps the court in any judicial proceedings. In the instant case notwithstanding that the senior federal counsel has volunteered to help the court in her capacity as amicus curiae, however, in my view she can only be heard if invited by the court to do so. It is beyond any shadow of doubt that a judge acting judicially is not, by virtue of s 14 of the Courts of Judicature Act 1964 ('the CJA'), liable to be sued in any civil court for any act done by him in the discharge of his judicial duty. I therefore agree with the senior federal counsel that any suit against a judge for an alleged libel contained in his written judgment will undoubtedly involved a matter of public interest. Having considered the subject matter of the suit and the fact that the senior federal counsel was invited by the learned SAR in the hearing before him, I did not see any valid reason to object the presence of the senior federal counsel as amicus curiae to appear and be heard in this application. I therefore overruled the plaintiffs objection and invited the senior federal counsel to appear in the proceedings as such. I am also of the view that the presence of the senior federal (sic) (counsel) at the hearing will not in any way be prejudicial to the plaintiffs case.

[7] While in *TSC Education Sdn Bhd*, I too had occasion to say something of that Latin phrase in this way (see p 584 to p 585 of the report):

> I have purposely described the first defendant as the sole defendant and there was a reason for this. When encl 4 came up for hearing before me for the very first time, Mr Gideon Tan

assisted by Ms Chin Yin Choi appeared for the plaintiff while Mr Oommen Koshy appeared as amicus curiae (literally, a friend of the court). It was the stand of Mr Oommen Koshy that he could not act for the first defendant because, according to him, the first defendant was not a legal entity and thus an appearance could not be entered for the first defendant. In America, the amicus curiae status has surpassed the traditional bounds of its common law ancestor. In its litigating form, the amicus has transcended its normal role of briefing the court. Some federal district courts in America have been very bold and have permitted the amicus to engage actively in oral argument, to introduce physical evidence, to examine witnesses, to conduct discovery, and even to enforce previous court decisions upon the participants to the litigation (see for example, *Hoptowit v Ray 682 F 2 d 1237, 1260 (9 Cir 1982)* (upholding amicus involvement in discovery and party-like participation at trial); *Re Estelle 516 F 2 d 480, 483 (5 Cir 1975)* (permitting United States as amicus curiae to employ full range of powers of party); *EEOC v Pan Am World Airways 52 Fair Empl Prac Cas (BNA) 926, 931 (ND Cal 1987)* (allowing amicus curiae ability to participate in all depositions, file briefs; and participate in a trial in an unspecified manner); *United States v Michigan, 116 FRD 655, 664 (WD Mich 1987)* (allowing amicus curiae to present evidence at trial, enforce consent decree, and engage in an oral argument); and *EEOC v Boeing Co, 109 FRD 6, 9-11 (WD Wash 1985)* (creating hybrid amicus status with ability to participate as counsel at the trial and also engage in discovery with EEOC). It is interesting to note that the history of the amicus device is very chequered. It dates back to the Roman law. It hinges on one single principle, namely, flexibility. In the case of *League of Women Voters v FCC 489 F Supp 517* at p 518 (CD Cal 1980), the court held that the role of amicus is flexible and can be moulded by the courts to surmount exigencies of the particular action. Under the Roman law, the amicus, at the court's discretion, would provide information on areas of law beyond the expertise of the court. It is from this practice that the English common law concept of an amicus develops where the amicus as a disinterested bystander would, at the court's request or permission, inform the court on points of law. The first reported case where the court allowed an amicus curiae to participate in a trial solely to protect third party interests was in 1736 in the case of *Coxe v Phillips 95 ER 152 (KB 1736)*. In Coxe, the court allowed the amicus to inform the court that the suit between the parties was collusive in nature that was ultimately designed to attack the marital status of the amicus. As I see it, Coxe enabled the amicus curiae to serve two masters: the court and the amicus's own interests. So much for the brief digression. Now, it is time to return to the present case at hand.

[8] In challenging the DB's locus standi to participate in the present proceedings, the learned counsel for the appellant contended that the parties to an action derived their locus standi from one of three categories as mentioned below:

(a) when they are named as the parties to the suit (here, the DB was not, according to the learned counsel for the appellant, named as a party to the present proceedings);

(b) when the court allows them to intervene as the relevant parties under O 15 r 6(2)(b) of the Rules of the High Court 1980 ('RHC') (here, it was pointed out that no order, whether by way of an application filed by the parties or the court on its own motion initiated the exercise, was ever made to allow the DB to be made a party to the present proceedings); and

(c) by way of a statute (here, according to the learned counsel for the appellant, the relevant statute would be the Legal Profession Act 1976 (Act 166) ('LPA') particularly s 103E(4) thereof which provides that the Bar Council may in its discretion intervene at any stage of any appeal under this section; but,

according to the learned counsel for the appellant, there was no provision in the LPA that allowed the DB to intervene in this appeal before this court). A

[9] Our attention was drawn to a letter from the Bar Council dated 7 June 2005 which was annexed as an exhibit to the affidavit of service affirmed by Adnan bin Md. Aris on 20 July 2005 as seen in encl 12A and in that letter the Bar Council indicated that they will not be intervening to oppose the appeal. Obviously, the Bar Council had decided not to intervene pursuant to s 103E(4) of the LPA. It was emphasised, time and again that there were no provisions in the LPA to allow the DB to intervene and that if the legislature had intended to vest the DB with the powers to intervene there would be provisions in the LPA similar to that of s 103E(4) of the LPA. Sadly, there was none. B C

[10] The learned counsel for the DB argued that the DB was intervening on the basis of being 'a party served'. But the learned counsel for the appellant submitted that it was erroneous on the part of the DB to argue that the mere service of the notice of appeal in encl 1 and the notice of motion in encl 4 would make the DB to be 'a party served'. According to the learned counsel for the appellant, the word 'party' in law carried with it some semblance of legal significance but the DB failed to appreciate its legal significance. It was said that a perusal of O 15 r 6 of the RHC would clearly show the distinction between the word 'person' and the word 'party' and that Order states as follows (the relevant parts only): D E

> 6 Misjoinder and non-joinder of parties (O 15 r 6)
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> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party; F
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or G
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter; H
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

[11] It was pointed out by the learned counsel for the appellant that the DB, if at all it was served, which was denied, was nothing more than 'a person served'. And as 'a person served', the DB in order to be a party must fall into one of the three categories as mentioned above. It was said that only the respondent was 'a party served' in this appeal and that both the Bar Council and the Directors of the Complaints Secretariat who were the other persons served were merely 'persons served'. The Bar Council was said to be in a unique position in that it had the I

discretion and the option to become 'a party served' the moment it chose to intervene in the proceedings under s 103E(4) of the LPA. And that until such time when the Bar Council exercised its option, the Bar Council even though served with the cause papers would remain as 'a person served'. Applying these arguments, it was pointed out by the learned counsel for the appellant that the DB was not and can never be 'a party served'.

[12] The DB argued that it had been served with the cause papers and therefore it was a party to the proceedings. The appellant took exception to this argument. It was the stand of the appellant that mere service of the cause papers cannot make the DB a party to the proceedings. It was argued that if the DB's contention was correct then the Bar Council would similarly be a party to the proceedings as a party served. And if such were the position there would then be no necessity for the existence of s 103E(4) of the LPA (which gives the Bar Council the right to intervene at its discretion) because under r 3(3) of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 it was mandatory to serve the Bar Council with the notice of appeal. It was emphasized that the DB's contention can only be right if s 103(E)(4) of the LPA was considered as superfluous. Towards this end, the appellant relied on the case of *Majlis Peguam & Anor v Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 2 MLJ 271; [1997] 3 CLJ 332, particularly to the headnote at p 335 which reads:

> In interpreting statutory provisions, no word of the Legislature should be construed as superfluous and of no effect simply to enable the Court to rewrite legislative language. The doctrine of absurdity and redundancy in respect of legislative words must be applied with extreme caution and must not be applied when an explanation can be found for the words used.

and argued that the matter can be explained in this way. That when the Bar Council was served, the service thereof did not give locus to the Bar Council. Rather it merely served as a notification that the Bar Council in pursuance of s 103(E)(4) of the LPA and at its discretion can intervene and it was for these reasons that the said section was said to have a purpose to serve and was therefore not superfluous.

[13] Next, it was argued by the learned counsel for the appellant that the DB was not served with the notice of appeal. Now, the notice of appeal as seen at p 13 of the appeal record showed that the DB was not named as a person to be served and therefore the contention of the DB that it was 'a party served' was misconceived. The misconception by the DB that it has been served stemmed from the erroneous belief that when service was effected on the Director of the Complaints Secretariat who also happened to serve as the Secretary of the DB and sharing the same address as the DB, that service on the said Director was said to be and must be construed to mean service onto the DB as well. It was argued that the DB failed to appreciate the fact that the Director of the Complaints Secretariat was a position created by statute in s 98 of the LPA and therefore the Director can be said to be a legal persona. The Director of the Complaints Secretariat was appointed by the Bar Council and paid a remuneration by the Bar Council and the individual was also responsible for the daily administration of complaints against Advocates and Solicitors. One of the functions of the Director of the Complaints Secretariat was to serve not only as the

secretary to the DB but also as the secretary to the Disciplinary Committee ('DC') and the secretary to the investigating tribunal ('IT'). Section 98 of the LPA enacts as follows:

> 98 Director of the Complaints Secretariat
>
> (1) The Bar Council shall, from time to time as may be required, appoint an Advocate and Solicitor of not less than five years' standing to the office of the Director of the Complaints Secretariat.
>
> (2) The Director shall serve as the Secretary to the Disciplinary Board, the Disciplinary Committee and the Investigating Tribunal.
>
> (3) The Bar Council shall be responsible for the remuneration of the Director and shall have the power to revoke his appointment.
>
> (4) The Director shall be responsible for the daily administration of complaints against Advocates and Solicitors under this Part.

But just because the Director of the Complaints Secretariat wore three caps that cannot, according to the appellant's counsel, make him the Director of the DB. It was emphasized by the learned counsel for the appellant that the Director of the Complaints Secretariat was served in that capacity as required by law and that the DB was not served at all.

[14] Basically, the appellant's stand was this. That the DB had no locus to participate in these proceedings.

[15] Now, the DB is a creature of statute. It is set up pursuant to s 98 of the LPA. The findings of the IT are forwarded to the DB for its consideration and decision for a DC to be appointed by it if the DB so decides to hear and investigate the complaint further. After hearing and investigating further, the DC thereafter makes a report of its findings and makes its recommendations to the DB. The DB has the power to accept or reject the recommendations of the DC and the DB too has the power to impose such sentence, as it deems appropriate after considering the report of the DC.

[16] It was argued by the learned counsel for the appellant that the DB in exercising its statutory function under the LPA, was in fact exercising a judicial function and that judicial function was in the nature of performing a judicial act. In *TN Metal Industries Sdn Bhd & Ors v Ng Pyak Yeow* [1996] 4 MLJ 567, the court at p 582 explained the phrase 'judicial act' in this way:

> A judicial act is one wherein upon the occurrence of a dispute the matter is heard and adjudicated upon with or without the exercise of discretion.

[17] A question was then posed by the learned counsel for the appellant and that question was phrased in this way. Having performed a judicial function, can the DB then participate at the appeal stage of its decision and judgment to defend itself? And according to the learned counsel for the appellant this would be akin to a trial Judge appearing at the appeal stage against the appellant to explain his action and to defend his decision. The law, so said the learned counsel for the appellant, would not

permit this to be done. Two reasons were advanced by the learned counsel for the appellant and they were as follows:

(a) When the DB made the order to strike out the appellant from the Roll, the DB's functions came to an end. It became functus officio. The DB did not have the jurisdiction thereafter to pursue this matter right up to the appellate stage - right up to the High Court.

(b) Allowing the DB to participate in the appeal would be a breach of natural justice. It was emphasised that the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done must be strictly adhered to. Of course, this golden principle was one of the twin pillars of the legal concept of natural justice. It was argued by way of an analogy that if the Judge whose decision was appealed against participated in the appeal there would be an appearance of bias. It could lead to a misconception by the average layman that the Judge was all out against the appellant. In such a situation it was argued that the very decision of the Judge appealed against would be questioned. It was said that everything would appear to be bias. It was even said that the participation of the Judge would appear to make it personal. And that the dispute would then not be between the appellant and the respondent but rather between the appellant and the Judge. And in such a situation, justice would then not be seen to be done. And that the whole episode would bring the judicial body into disrepute.

[18] With respect, all these arguments were misconceived. It was wrong to equate the DB to the high office of a judge notwithstanding s 93(3)(a) of the LPA which enacts that:

> 93 Disciplinary Board
>
> (3) The Disciplinary Board shall consist of the following: (a) the chairman of the Disciplinary Board appointed by the Chief Justice and such person shall be a Judge of the High Court or Supreme Court, a retired Judge of the High Court or Supreme Court or any other person who is qualified to be a Judge of the High Court or Supreme Court:
>
> Provided that in a case where a Judge of the Supreme Court is to be appointed as the chairman, such appointment shall be made by the Chief Justice in consultation with the Lord President.

[19] Now, looking at the appeal record at p 41 thereto, the chairman of the DB is not a serving judge of the High Court or the Federal Court and he is not even a retired judge of the High Court or the Federal Court but he may be a person who is qualified to be a judge of the High Court or the Federal Court. I am aware that the average layman may be interested in the outcome of the appellant's appeal before us. We were aware of the rule against bias and we were particularly drawn to the passages that appeared in MP Jain's *Administrative Law of Malaysia and Singapore* (3rd Ed), in particular p 358 thereto. There, the learned author wrote:

> The principle that bias disqualifies an individual from acting as an adjudicator flows from two fundamental maxims: (1) a man should not be a judge in his own cause; and (2) justice must not only be done but be seen to be done. The first maxim applies not only when the adjudicator is himself a party to the dispute he is deciding, but also when he has some

interest therein. The interest may be pecuniary or personal or of some other type. According to the second maxim, it is not necessary to prove that a particular decision was in fact influenced by bias. It is sufficient if there is reasonable suspicion about the adjudicator's fairness. The fountain of administrative justice must not only be pure but it must also enjoy public confidence and credibility. The adjudicator must not only be free from bias, but there must not even be an appearance of bias. In applying the rule against bias the courts have emphasised the concept of public confidence in the administration of justice.

[20] Our attention was drawn to the affidavit of the senior legal officer with the Complaints Secretariat by the name of Tomis Anak Peter Samat, who affirmed the affidavit on behalf of the DB and that affidavit was affirmed on 20 July 2005 as seen in encl 12 which exhibited a letter dated 1 July 2005 marked as 'TAPS-5'. The letter was written by the respondent to the DB and the Bar Council wherein the respondent narrated his version of the matters raised in the appeal. That letter was worded in this way:

Mr. Hong Tuan Teck

No. 8, Jalan 12/38A

Taman Sri Sinar

Segambut

51200 Kuala Lumpur

Mobile Phone 016-2209328

1st July 2005

Dato' Serf Khalid Ahmad Bin Sulaiman

Chairman

Lembaga Tatatertib Peguam-Peguam

8th & 9th Floor Wisma Maran

Medan Pasar

50050 Kuala Lumpur

The President of the Bar Council 13th,

15th and 17th Floor Lebuh Pasar Besar

50050 Kuala Lumpur

Dear Sirs

KUALA LUMPUR HIGH COURT APPEAL NO R-17B-18-05 ADVOCATES AND SOLICITORS' DISCIPLINARY BOARD COMPLAINT NO DB/97/0202

I refer to the above notice of motion filed by Messrs Nordin Torji and Partners, a copy of which was given to my wife at around 9.00 p.m, on the 22nd June 2005. I have gone outstation and only came back to Kuala Lumpur on the 25th June 2005. I wish to set the record right as below.

I do not agreed (sic) (agree) with the statement made on the following items.

Notice of Motion - Item 14

Quote: This fact has been suppressed and concealed by the respondent at all material times. Unquote.

I wrote to Dato' Nadarajan on 18th August 2004 requesting him to confirm a transaction in my Maybank Berhad account no. 114011453516 for the amount of RM2,800 on 6th August 2004. I have not heard from him nor received any confirmation to the said transaction. I enclosed (sic) (enclose) a photocopy of the letter dated 18th August 2004 which was sent to him for your attention and record.

Exhibit N-l

Letter dated 3rd May 2005 from Dato' Nadarajan to the Chairman, Lembaga Tatatertib Peguam-Peguam

Paragraph 6

Quote: "The complainant had not paid the fees. He had only paid RM1,000 as initial disbursements. Since he did not pay the fee the firm had a Lien over the judgement sum for fees and the RM2,800 was forfeited for unpaid fees." Unquote

As far as the fees is concerned, I did not owed (sic) (owe) him any money and all payments have been fully settled.

Paragraph 7

In any event, I am now a Dato' and a JP and I did not want this small misunderstanding to be blown out of proportion. I agreed to pay the complainant the RM2,800 without admitting liability and requested him to withdraw the complaint. He agreed.

During our meeting on 24th March 2004, Dato' Nadarajan did not say that he will make any payment to me neither did he request me to withdraw the complaint, but he did request for 6 weeks to investigate, which I agreed. He said that he will revert to me once he has finished his investigation. Since then, I have not heard from him at all. I enclosed (sic) (enclose) two copies of the letter dated 27th March 2004 for your record.

Thank you.

Yours faithfully

Sgd. (Illegible) Hong Tuan Teck

cc Dato' Wong Soon Foh Chairman Disciplinary Committee c/o Messrs S K Yeoh & Partners 28 Jalan Kamunting 55100 Kuala Lumpur Tel No. 03-21415733 Fax No. 03-21420733

cc Mr. Gurbakhash Singh Chairman of the Investigating Tribunal c/o Messrs Gurbakhash Singh & Co 117 Jalan Bukit Pantai 59100 Kuala Lumpur Tel No. 03-2094 7795 Fax No. 03-2094 0795

cc Ms Cindy Chan, Bar Council Kuala Lumpur Fax No. 03-20342825

cc Ms Tomis, Complaints Secretariat Fax No. 03-20312163

[21] Suffice for me to say that this letter was not part and parcel of the appeal record and it had been brought in by the DB for the sole purpose of putting forth the defence of the respondent. It was pointed out by the learned counsel for the appellant that the respondent had not filed any affidavit in regard to those matters

that were raised in the letter dated 1 July 2005 as set out above and because of that it was argued that the respondent found it unnecessary to appoint a lawyer to oppose the appeal for the simple reason that the DB was doing the work for him. It was for these reasons that the appellant vehemently objected to the presence of the DB in this appeal. It was emphasised that anyone who witnessed these proceedings would come to the conclusion that the DB wanted the appellant to remain convicted at all costs. And that one would wonder whether justice was done when the disciplinary proceeding was conducted before the DB. Was there, according to the learned counsel for the appellant, an element of malice at play bearing in mind that the Bar Council has deemed it fit not to intervene? It was reiterated that being a creature of statute, the DB can only participate in this appeal if the LPA permitted it. Unfortunately, so it was pointed out, that there were no such provisions akin to that of s 103E(4) of the LPA which empowered the Bar Council to intervene at any stage of any appeal. That being the case, it was submitted that the DB cannot intervene at any stage of the present appeal.

[22] Now, in challenging the DB's locus standi to participate in the present appeal before us, the appellant submitted that the DB was not a party served with the cause papers. The appellant pointed out that the cause papers were served upon the Director of the Complaints Secretariat who by virtue of s 98 of the LPA was nothing more than an employee of the Bar Council. In other words, what the appellant was saying was this. That the cause papers were served upon the Bar Council and not to the DB. That the DB was not to be considered as a party that needed to be served with the cause papers. All these meant that the DB should not be before us in this appeal. With respect, we beg to disagree. If the learned counsel for the appellant was correct to say that the DB was not served with the cause papers, then the appeal before us would fail in limine. Rule 5 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994states as follows:

> 5 Filing of appeal record
>
> (1) Within six weeks of the receipt of the documents specified under subrule 4(3), the appellant shall file four copies of the appeal record in the High Court.
>
> (2) A copy of the appeal record shall be served personally on the respondent, the Director and the Bar Council.

and it showed the need for the appellant to serve personally a copy of the appeal record not only to the respondent and the Bar Council but also to the Director. And service of the appeal record to the Director would mean service to the DB. It must be borne in mind that the Director of the Complaints Secretariat was the Secretary to the DB by virtue of r 2 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994which defines the word 'Director' in this way:

> 'Director' means the Director of the Complaints Secretariat appointed under s 98 of the Act

[23] And since the DB was the body that made the decision now under appeal to us and s 98(2) of the LPA clearly provided that the Director was the Secretary to the DB, it must therefore be in the contemplation of Parliament that the DB should be served with the appeal record. In *Lily Rossel a/p Sebastian lwn Pushpam a/p Subramaniam dan satu lagi* [2003] 3 MLJ 223, the High Court held that if no appeal

record was served upon the DB in accordance with the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994, the appeal was void and should be dismissed. The High Court also held that the DB can be made a party in an appeal involving its decision or order. But the learned counsel for the appellant argued that the decision of the High Court in *Lily Rossel Sebastian* was wrongly decided. The learned counsel for the appellant argued along the following lines. The issue that arose in *Lily Rossel Sebastian* was whether the DB can be made a party to the appeal by the complainant from its decision. The High Court was of the view that the DB could be made a party because the challenge to the DB being made a party to the appeal was mounted on the basis of s 111 of the LPA which states that no action shall lie against the DB for any act done under the LPA. The High Court was of the view that, no action was being brought against the DB but the DB was merely named as a party and that was perfectly in order. However, it was submitted that the argument was never put forth to the High Court that the DB having been the adjudicating and judicial body should not be named as a party as it would bring the system of the administration of justice into disrepute because once so named, the DB would have to defend its decision. If this argument had been advanced before the High Court in *Lily Rossel Sebastian*, it was submitted that the High Court would certainly have viewed the issue on a wider perspective and not confined itself to s 111 of the LPA only and may have decided otherwise. Section 14(1) of the Courts of Judicature Act 1964 enacts that, 'No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of, and flowing from that, a question arose: would it be possible to name the judge as a party to the appeal arising from the judge's own decision and to say that the said judge was not being sued but merely being named as a party and therefore allowed? It was submitted that no court in this country would entertain such a proposition. And so it was argued that the decision of the High Court in *Lily Rossel Sebastian* was plainly wrong and should not be followed by this court.

[24] It must be recalled that in the first judgment, I had allowed counsel for the DB to appear before me and to submit 'as a friend of the court'. Here, we were unanimous in allowing Mr Su Tiang Joo to address us as a friend of the court and we were comforted by the decision of *Tai Choi Yu v Ian Chin Hon Chong*. In that case, the application was supposed to be made ex parte but at the very outset of the hearing the learned senior federal counsel from the Attorney-General's chambers appeared before the court and the plaintiff objected to her presence at the hearing on the ground that the application was ex parte and that she was not retained by the defendant to act on his behalf. The plaintiff also argued that the judge was not a public servant and therefore the judge cannot be represented by the senior federal counsel in the proceeding. The learned senior federal counsel explained that she was not acting for the defendant but only appeared as amicus curiae. She further informed the court that she was allowed to appear in such a capacity in the hearing before the learned senior assistant registrar. In order to justify her presence as amicus curiae, she argued that the application involved a matter of public interest where a judge was being sued for an alleged libel contained in his written judgment. Likewise here, the appeal in this case concerned the legal profession which attracted public

interest. And because it was the DB that made the decision now under appeal, the DB's presence in court would certainly be of assistance to this court. The DB was in a position to bring forth any relevant and admissible evidence that may arise in the course of hearing this appeal. As the governing body for the discipline of advocates and solicitors, the participation of the DB in this appeal would certainly assist this court in arriving at a just decision. We were constrained to allow the DB to be present through the representation of Mr Su Tiang Joo as a friend of the court. In *Squibb United Kingdom Staff Association v Certification Officer* [1979] 2 All ER 452, Lord Denning MR at p 457 suggested that in future the Treasury Solicitor should come as a friend of the appeal tribunal and this case was cited with approval by Hashim Yeop A Sani CJ (Malaya) in *Selvamary v Rethinasamy* [1991] 1 MLJ 156, and using *Squibb's case* we were certainly entitled to allow the DB to participate in these proceedings.

[25] Extension of time to appeal as per prayer 1 of encl 4 and the notice of appeal lodged by the appellant be deemed as valid under prayer 2 of encl 4.

[19] Section 103E(1) of the LPA enacts as follows:

103(E) Appeal from the decision of the Disciplinary Board

(1) Any party aggrieved by any decision or order made by a Disciplinary Board shall have the right to appeal to the High Court within one month of notification of the decision or order complained against.

[26] It is the time frame given to any aggrieved party to appeal to the High Court from the decision of the DB. Once notified of the decision or order of the DB, the aggrieved party has the right of appeal to the High Court within one month of the date of the notification. Now, the order made by the DB striking the appellant off the Roll was made on 31 March 2005. It was sent by registered and ordinary posts to the appellant's last known residential address at No B65, Taman Semangat, Jalan Sekerat, 08000 Sungai Petani, Kedah under cover of a letter of similar date (see exh 'N-2' of encl 3 and exh 'TAPS-4' at p 26 of encl 12). And it was not returned undelivered and so, prima facie, the appellant's appeal in encl 1 lodged on 16 May 2005 was out of time. There is no provision in the LPA for the court to enlarge time for this purpose and this has been so stated by Hashim Yeop A Sani CJ (Malaya) in *Selvamary v Rethinasamy*, particularly at p 159 thereof. This was what his Lordship said:

As regards the question of expiry of the period of appeal we agree with the conclusion of the learned judge that under s 103(1) of the LPA a complainant has 14 days from the date of receipt of the Bar Council's decision within which to appeal if he is dissatisfied with the decision. But there is no provision in the LPA for the court to enlarge time for this purpose. Since the time limited for appealing has long since expired, the appeal was not properly before the court. The appeal against the second issue is dismissed.

[27] Indeed the case of *Selvamary v Rethinasamy* was considered by the High Court in *Lily Rossel Sebastian,* and, on the issue of the expiry of the period of appeal, this was what the High Court said at p 669:

Dengan itu, tanpa sebarang bukti oleh perayu bahawa rayuan ini difailkan dalam tempoh satu bulan dari tarikh beliau menerima keputusan tersebut, rayuan ini tidak boleh dinyatakan teratur dan bantahan yang dibangkit oleh responden kedua bagi diri beliau dan responden pertama bahawa rayuan ini tidak difailkan dalam tempoh satu bulan diterima. Walau bagaimanapun, r 11 Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 menyatakan bahawa di mana tidak ada peruntukkan di bawah Kaedah-Kaedah ini prosedur dan amalan dalam Kaedah-Kaedah Mahkamah Tinggi 1980 dipakai.

[28] Notwithstanding the fact that *Lily Rossel Sebastian* held that the RHC was applicable by virtue of r 11 of the Legal Profession (Disciplinary Proceedings) (Appeal) Rules 1994 yet certain factors have to be taken into account in deciding whether to extend time because that power is entirely and purely discretionary in nature. And those factors may be stated in the words of Faiza Tamby Chik J in *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416 as follows:

> Further the defendant may seek to rely on O 3 r 5(1) of the RHC. Order 3 r 5(1) of the RHC provides:
>
> the court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.
>
> In exercising its discretion under O 3 r 5 (1) of the RHC, the court should take into account certain factors, such as:
>
> (a) the delay in making the application;
>
> (b) whether or not there are cogent reasons for the litigant not to have made the application within the prescribed time;
>
> (c) the likelihood and degree of prejudice, as well as the injustice to the opposite party should the court exercise its discretion.

[29] The DB's stand was simply this. That, at all material times, the appellant had knowledge that there were disciplinary proceedings against the appellant right from the very beginning. The evidence of such knowledge can be seen in the affidavit of Tomis Anak Peter Samat in encl 12 as alluded to earlier and in that affidavit the deponent annexed exh 'TAPS-2', a fax transmission, which showed that the appellant had spoken to the chairman of the IT in the person of Mr Gurbakhash Singh and the conversation was recorded by the appellant and the appellant too had produced a medical certificate to the IT to say that he was ill and could not attend the hearing that was fixed on 3 March 2004. The fax transmission of the appellant can be seen at p 17 of encl 12 by way of exh 'TAPS-2' and it was worded in this way (see p 20, exh 'TAPS-2' of encl 12):

> Wan Majid, Mano & Nada
>
> No. A-3, Tingkat Satu,
>
> Jalan Sekerat,
>
> 08000 Sungai Petani,
>
> Kedah Darulaman.
>
> TEL: 04-4230101 FAX: 04-4230505

FAX TRANSMISSION

TO	Mr. Gurbakhash	FROM	Dato' V. Nadarqjan
COMPANY		FAX	03-20947795

OUR REF:

DATE	3/3/04	PAGES	

YOUR REF:

MESSAGE:

Dear Mr. Gurbakhash,

I refer to our conversation today. Enclosed pi. find my M.C. for your further action.

Thanks.

With Regards.

Sgd. (Illegible).

[30] And the medical certificate can be seen at p 18 of encl 12 by way of exh 'TAPS-2'. Subsequently, the hearing date was postponed from 30 March 2004 to 11 May 2004 due to the respondent agreeing to the request of the appellant to grant the appellant an extension of time to investigate the matter before the hearing. The new hearing date — scheduled on 11 May 2004, was conveyed to the appellant via a telephone conversation between the appellant and the chairman of the IT in the person of Mr. Gurbakhash Singh and a letter dated 26 April 2004 to inform the appellant of the new hearing date was also sent to the appellant. That letter dated 26 April 2004 was worded in this way (see 20, exh 'TAPS-2' of encl 12):

PRIVATE & CONFIDENTIAL

26th April 2004

1) Dato V. Nadarajan

C/o Wan Majid Mano & Nada A-3,

2nd Floor, Taman Kampian

Jalan Sekerat 08000 Sungai Petani

KEDAH DARUL AMAN

2) Mr. Hong Tuan Teck

No. 8 Jalan 12/38A Taman Sri

Sinar Segambut 51200

Kuala Lumpur

A

Re: Complaint No: DB/97/0202
Complainant : Mr Hong Tuan Teck
Respondent : Dato V. Nadarajan

B

Please be informed that the hearing will be held on 1st May 2004 at 2.30 p.m. at:

8 Floor, Wisma Maran 28

Medan Pasar 50050

Kuala Lumpur

C

Yours faithfully

Sgd.

GURBAKHASH SINGH

D

Chairman

Investigating Tribunal

c/o Messrs Gurbakhash Singh & Co

117 Jalan Bukit Pantai

E

59100 Kuala Lumpur

Tel. No. 03-20947795

Fax No. 03-20940795

F

P.S. Respondent telephoned me and I gave him the hearing date and also send this letter.

Sgd. (Illegible).

In regard to the service of documents through the post, I need to refer to s 12of the Interpretation Acts 1948 and 1967(Act 388) which enacts as follows:

G

12. Service by post.

Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service:

(a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and

H

(b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

And I too need to refer to s 101(4) of the LPA which enacts as follows:

I

101 Investigation

(4) Before the Investigating Tribunal commences its hearing in respect of any matter:

(a) the Investigating Tribunal shall post or deliver to the Advocate and Solicitor concerned:

(i) a copy of any written application or complaint and of any statutory declaration or affidavit that has been made in support of the application or complaint; and

(ii) a notice inviting the Advocate and Solicitor concerned, within such period (not being less than fourteen days) as may be specified in the notice, to give to the Investigating Tribunal any written explanation he may wish to offer and to advise the Investigating Tribunal if he wishes to be heard by the Investigating Tribunal; and

(b) the Investigating Tribunal shall allow the time specified in the notice to lapse and give the Advocate and Solicitor concerned reasonable opportunity to be heard if he so desires and shall give due consideration to any explanation he may make.

In construing s 101(4) of the LPA, it would be appropriate to make reference to s 12 of the Interpretation Acts 1948 and 1967 (Act 388). Thus, when a document is required to be served by post it shall be presumed to be posted effectively: (a) by properly addressing, prepaying and posting by registered post the letter containing the document; and (b) when the letter would have been delivered in the ordinary course of the post. These two presumptions are rebuttable on the balance of probabilities and it falls on the appellant to rebut these two presumptions. Sadly, the appellant failed to do so.

[31] Now, although rr 12 and 20 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 provide that the notices of hearing before the IT and the DC have to be sent by acknowledgement of receipt registered posts, in the present appeal before us, the appellant was informed of the hearing date before the IT both orally and by way of registered post. While in the case of the hearing before the DC, the appellant was informed by way of a letter sent by acknowledgement of receipt registered post with the AR card coming back duly acknowledged as reflected at p 24 of exh 'TAPS-3' annexed to the affidavit of Tomis Anak Peter Samat in encl 12.

[32] All these would show that the appellant knew of the disciplinary proceedings but he purposely chose not to present himself at the hearing. The appellant averred at para 5 of his affidavit affirmed on 16 May 2005 at encl 3 that he was not aware of the proceedings both before the IT and the DC, but this court was of the view that such an argument was unsustainable bearing in mind the overwhelming evidence that was presented before this court. Whilst the appellant was quick to say that he had moved from time to time, yet there was no evidence led by him to show that he had informed the Bar Council of his change of residential address. As far as the Bar Council was concerned, its records showed that the last known residential address of the appellant was at number B65, Taman Semangat, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman (see exhibit marked as 'N4' annexed to the affidavit of the appellant in encl 3) and letters were sent there by registered posts and, save for only one occasion when one letter came back undelivered, the others did not come back at all. On one occasion, as alluded to earlier, the AR card came back duly acknowledged (see p 24 of encl 12 of exh 'TAPS-3').

[33] At p 242 of the first judgment as reported in the AMR, I have alluded to the brief facts of the present appeal in this way:

> The appellant was struck off the roll of Advocates and Solicitors by an order dated March 31, 2005 made by the Advocates and Solicitors Disciplinary Board and that order was to

take effect twenty-one (21) days from the date of the order. A letter emanating from the Advocates and Solicitors Disciplinary Board dated March 31, 2005 together with the order dated March 31, 2005 were sent to the appellant by way of an AR registered post and by way of ordinary post as seen at exh TAPS4 of encl 12.

The appellant alleged that he only came to know about the said order on May 2, 2005 from a friend and he then secured confirmation of the same by proceeding to the office of the Advocates and Solicitors Disciplinary Board in person.

[34] And in order to test the veracity of the story of the appellant that he only came to know about the order striking him off the Roll from a friend on 2 May 2005 and that he secured confirmation of the same by attending in person at the office of the Advocates and Solicitors Disciplinary Board on 9 May 2005,1 shall now set out the chronology of events commencing from the receipt by the DB of the complaint and leading right up to the order striking off the appellant from the Roll on 31 March 2005. In so doing, I must emphasise that the dates were very relevant and they set out the events in an orderly manner:

(a) On 19 August 1997 at p 23 of the appeal record in encl 9, a letter of complaint from the respondent to the DB containing letters received by the DB on 27 August 1997 as seen at p 24 to p 27 of the appeal record in encl 9.

(b) On 5 January 2004, the IT sent a letter by registered post to the appellant at c/o Wan Majid Mano & Nada, at A-3, 2nd Floor, Taman Kampian, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman as seen at exh 'TAPS-2' annexed to the affidavit of Tomis Anak Peter Samat in encl 12 at p 13 to p 14 thereof. In that letter, the IT asked the appellant to give a written explanation and whether the appellant wished to be heard before the IT. Unfortunately, there was no response from the appellant.

(c) On 6 February 2004, the IT sent a letter by way of a registered post to the appellant at c/o Wan Majid Mano & Nada, at A-3, 2nd Floor, Taman Kampian, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman conveying the information that the hearing before the IT would take place on 3 March 2004 at 2.30 pm at the 8th Floor, Wisma Maran, 28 Medan Pasar, 50050 Kuala Lumpur. This very letter can be seen at p 15 to p 16 of exh 'TAPS-2' annexed to the affidavit of Tomis Anak Peter Samat in encl 12.

(d) (d) On 3 March 2004, the appellant spoke to the chairman of the IT in the person of Mr. Gurbakhash Singh and this conversation was recorded in writing in a fax transmission from the appellant to Mr. Gurbakhash Singh enclosing a medical certificate of the appellant. The fax transmission has been annexed as an exhibit marked as 'TAPS-2' to the affidavit of Tomis Anak Peter Samat in encl 12 and it can be seen at p 17 to p 18 of encl 12.

(e) On 4 March 2004, the IT sent a letter to the appellant by way of a registered post at the appellant's address at c/o Wan Majid Mano & Nada, at A-3, 2nd Floor, Taman Kampian, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman. In that letter, the IT conveyed the message to the appellant to the effect that the hearing before the IT had been postponed to 30 March 2004 at 10.30 a.m. and that it will be held on the 8th Floor, Wisma Maran, 28 Medan Pasar, 50050 Kuala Lumpur. This very letter can be seen at p 19 of exh

'TAPS-2' annexed to the affidavit of Tomis Anak Peter Samat in encl 12. On 26 April 2004, the appellant was informed of the new hearing date of 11 May 2004 scheduled at 2.30pm on the 8th Floor, Wisma Maran, 28 Medan Pasar 50050 Kuala Lumpur by way of a telephone conversation between the appellant and Mr. Gurbakhash Singh. This telephone conversation was noted in the formal letter taken out and sent to the appellant by way of a registered post at the appellant's address at c/o Wan Majid Mano & Nada, at A-3, 2nd Floor, Taman Kampian, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman. This very letter can be seen at p 20 of exh 'TAPS-2' annexed to the affidavit of Tomis Anak Peter Samat in encl 12 and it has been reproduced somewhere in this judgement.

(f) On 11 May 2004, the IT put up a report as seen at p 29 to p 31 of the appeal record at encl 9. This was a report prepared by the IT to investigate a complaint against the appellant. In that report, it showed that the appellant did not turn up and the hearing by the IT proceeded in the absence of the appellant. The IT found that the appellant failed to reply to the respondent's letters and had also failed to account for the money received by his law firm on behalf of the respondent. The IT recommended that there should be a formal investigation by the DC. In its report, the IT summarised the complaint of the respondent in this way (see p 29 of the appeal record in encl 9):

(i) The respondent (referring to the appellant) was retained as a solicitor by the complainant to file an action against Standard Chartered Bank.

(ii) The respondent (referring to the appellant) did file an action.

(iii) Judgment was obtained against Standard Chartered Bank and Standard Chartered Bank did make payment to the respondent (referring to the appellant).

(iv) The respondent (referring to the appellant) failed to forward the money to the complainant and also refused to reply to his letters and answer his telephone calls.

(g) On 4 November 2004, the Disciplinary Committee by letter and sent to the appellant by way of an AR registered post to the appellant's address at number B65, Taman Semangat, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman notified the appellant of the hearing by the Disciplinary Committee scheduled on 9 November 2004 at 10.00 a.m. at the Advocates & Solicitors' Disciplinary Board, on the 8th Floor, Wisma Maran, 28, Medan Pasar, 50050 Kuala Lumpur. This letter can be seen at p 22 to p 23 marked as exh 'TAPS-3' annexed to the affidavit of Tomis Anak Peter Samat as seen in encl 12.

(h) On 7 November 2004, the AR card was returned showing that the receipt of the letter dated 4 November 2004 as alluded to in para (h) above was duly acknowledged by the appellant and that AR card can be seen at p 24 of encl 12.

(i) On 9 November 2004, at the hearing before the DC, the appellant did not turn up. The hearing conducted by the DC proceeded in the absence of the appellant. The DC found the appellant guilty of misconduct and recommended that the appellant be struck off the Roll. The report and record

of the DC's hearing the complaint can be seen at p 37 to p 39 of the appeal record in encl 9. The DC summarised the complaint of the complainant in this way (see p 37 of the appeal record in encl 9):

> 4. Summary of the Complaint
>
> Respondent was retained by the Complainant to file an action against Standard Chartered Bank ('Bank'). Action was filed by the respondent against the Bank and Judgment was obtained against the Bank for RM2,805.00 inclusive of interest and costs in December 1993. The sum of RM2,805.00 was duly paid by (sic)(the) Bank's solicitors to the respondent vide letter of 21 February 1994, receipt of which was duly acknowledged by the respondent's firm.
>
> The respondent did not make any payment to the complainant and also failed to respond to any of the complainant's letters inquiring into the progress of the action filed.

(j) On 31 March 2005, the DB accepted and adopted the recommendation of the DC and the DB ordered the appellant to be struck off the Roll of Advocates and Solicitors of the High Court of Malaya as seen at p 41 of the appeal record in encl 9. This order of striking off the Roll was sent to the appellant at number B65, Taman Semangat, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman by way of a letter dated 31 March 2005 as seen at exh 'TAPS-4' at p 26 of the affidavit of Tomis Anak Peter Samat in encl 12. This letter containing the order of the DC were together sent to the appellant at the said address by registered and ordinary posts and the letter was not returned undelivered. On 11 May 2005, the records of the Bar Council showed the appellant's last known house address to be at No: B65, Taman Semangat, Jalan Sekerat, 08000 Sungai Petani, Kedah Darulaman. In exh 'N-4' of the affidavit of the appellant affirmed on 16 May 2005 as seen in encl 3, the Bar Council records showed:

> Re: Confirmation Pertaining To My Practice - Nadarajan s/o Veraya
>
> We refer to your letter dated 10 May 2005 and append below the information as requested from our records.

Firm	Period of Practice
Messrs Wan Majid & Mano Messrs V Nadarajan & Associates Messrs V Nadarajan Bhag Sulaiman & Co Messrs Wan Majid Mano & Nada	From 17/7/1986 to 30/10/1987 From 1/11/1987 to 9/4/1989 From 10/4/1989 to 30/4/1994 From 1/5/1994 to 31/12/2003

> From our records, on 21st February 1994 he was practising in (sic)(with) Messrs V Nadarajan Bhag Sulaiman & Co. The last known house and office address (sic)(addresses) are as stated herein below:
>
> Office Address:
>
> Messrs Wan Majid Mano & Nada
>
> Suit 802, 8th Floor Plaza Permata (IGB)
>
> No. 6, Jalan Kampar Off
>
> Jalan Tun Razak 50400 Kuala Lumpur.

House address:

No. B65,

Taman Semangat Jalan

Sekerat 08000

Sungai Petani Kedah.

[35] For the reasons as adumbrated above, we were unanimous that prayers (1) and (2) of encl 4 ought to be refused. The appellant knew of the hearings before the IT and the DC and he refused to attend those hearings. Now, realising his folly, he was trying to justify his absence from attending those scheduled hearings. Moving from one place to another, cannot absolve the appellant from blame and neither can he succeed in prayers (1) and (2) of encl 4. It was the appellant's duty - burden having shifted to him, by virtue of s 12 of the Interpretation Acts 1948 and 1967(Act 388), to show to this court as to why the extension of time for the appellant to pursue his appeal ought to be allowed. He has failed to discharge that burden on the balance of probabilities. He too has lodged an appeal out of time and enlargement of time should not be accorded to him. It appeared to us that he was not interested in attending the scheduled hearing dates before the IT and the DC. He was just not bothered at all.

[36] It was part and parcel of our judgment that it was crucial to the appellant to be allowed to extend time to pursue his appeal. The unanimous decision of this court to refuse to extend time for the benefit of the appellant would mean that his appeal ought to be dismissed forthwith. That would have ended the matter, once and for all.

Merits of the appeal

[37] For the sake of completeness, I will now address the merits of the appellant's appeal notwithstanding the fact that he has failed in prayers (1) and (2) of encl 4.

[38] Two arguments were advanced by the appellant. Firstly, he was not aware of the investigations into the complaint brought against him. Secondly, he had in fact, without admitting liability, paid a sum of RM2,800.00 to the respondent who had agreed to withdraw the complaint against the appellant.

[39] From the chronology of events as alluded to above, it was quite apparent that the appellant was aware that there were disciplinary proceedings conducted by the IT and the DC against him. The appellant had chosen, unfortunately, not to put up any written explanation nor present himself at these disciplinary proceedings.

[40] In regard to the alleged payment by the appellant, the respondent's complaint in his letter dated 1 July 2005 to the DB and the Bar Council as seen at p 32 of the affidavit of Tomis Anak Peter Samat in encl 12 of exh 'TAPS-5' was that by way of a letter dated 8 August 2004 from the respondent to the appellant, as seen at p 34 of the affidavit of Tomis Anak Peter Samat in encl 12 of exh 'TAPS-5', the respondent had enquired of the appellant as to whether it was the appellant who had banked in

the money. And to this query, the respondent said that the appellant never responded at all (see pp 32–33 of encl 12). It must be borne in mind that the appellant did not reply to the respondent's letters since 1995 in order to explain to the respondent in regard to the judgment sum that was given in favour of the respondent under a civil action in the magistrate's court as alluded to at pp 17 to 27 of the appeal record at encl 9. There was also no notification to the respondent, at all, that the sum of RM2,800 was forfeited for unpaid fees as alleged in exh 'N-l' of the appellant's affidavit in encl 3. In any event and, at any rate, the respondent had denied that there were any unpaid fees and that all payments had been fully settled as set out in the respondent's letter in exh 'TAPS-5' at p 32 of the affidavit of Tomis Anak Peter Samat in encl 12.

[41] It was only after the setting up of the IT that prompted the appellant to contact the respondent in March 2004 in order to seek for an extension of time for the hearing of the IT so as to investigate the complaint (see exh 'TAPS-5' at pp 32–33 of the affidavit in encl 12). It must be emphasised that during the hearing before the IT on 11 May 2004, the appellant failed to attend even though the notice of the hearing was given orally to the appellant by way of a telephone conversation between the appellant and the chairman of the IT in the person of Mr Gurbakhash Singh. The notice was also given to the appellant by way of a letter sent to the appellant by registered post.

[42] This court would not interfere with the findings of facts arrived at by the IT and the DC (*Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113). It was the appellant who chose to absent himself before the IT and the DC and by his absence he was unable to answer the complaint made against him by the respondent even though the appellant knew and was aware that there was a complaint against him at that material point of time.

[43] As a friend of the court, Mr Su Tiang Joo has certainly rendered an invaluable service. He has assisted this court at arriving at a just decision. He drew this court's attention to a report carried by the Straits Times of Singapore dated 26 August 2005 where the then Chief Justice of Singapore punished three errant members of the Singapore's legal profession for lying, cheating and stealing. That report certainly makes for an interesting reading material. We were not influenced by that report. We decided enclosures 4 and 1 purely on the facts and the law. Nevertheless, we felt that it was appropriate to reproduce that report and I shall now reproduce it accordingly:

> SINGAPORE: The legal profession received a stinging rebuke from the Chief Justice yesterday, as three errant lawyers were disciplined for lying, shoplifting and cheating.
>
> We can't have lawyers going around telling lies, CJ Yong Pung How said after hearing that lawyer Joseph Chen Kok Seng lied to prison officers that he was visiting a prisoner as a friend.
>
> It's becoming a most naughty profession in the world, he added.
>
> We have something like 6,000 lawyers here. We should strike them off the moment they misbehave.

Mr Chen was one of three lawyers who appeared before a Special Court of Three Judges of the Supreme Court to show cause why they should not be punished for engaging in unprofessional conduct.

The judges — CJ Yong, Judge of Appeal Chao Hick Tin and Justice Tay Yong Kwang heard that Mr Chen misrepresented himself after his request to interview a prisoner was turned down three times by Admiralty West Prison.

The prisoner, Gabriel Baldwin, had been punished by the prison superintendent for committing an offence while in jail and wanted Mr Chen to appeal against the punishment. The court was not told why Baldwin was in jail or what his offence and punishment were.

On 6 September 2001, Mr Chen, who is in his early 30s and has been a lawyer since July 1998, lied to prison officers that he was merely a friend of Baldwin. When the men met, prison officers saw the lawyer taking notes.

The Singapore Prisons Department complained to the Law Society, but Mr Chen failed to appear at its Disciplinary Committee meeting last year.

Nor was he present at yesterday's hearing.

Shaking his head sadly, CJ Yong said: 'He couldn't care less about appearing before the Disciplinary Committee, couldn't be bothered to defend himself.

What is the profession coming to?

The judges unanimously suspended Mr Chen from practising for four years. He was also ordered to pay costs to the Law Society for the proceedings.

CJ Yong noted that there was a similar case in May. Lawyer Ong Ying Ping, 42, was suspended for two years because he misled prison officers into believing that a woman he brought along when visiting a client was his assistant.

She was, in fact, the prisoner's wife.

Referring to the two-year suspension given to Mr Ong, CJ Yong said his colleagues were sometimes 'too generous', but the precedent has been set for the next time a lawyer misleads prison officers.

The two other lawyers dealt with yesterday — a shoplifter and a cheater — were also ordered to be struck off the Rolls.

She stole from store, he stole from clients.

FIVE years ago, lawyer Lilian Ong walked out of Tangs department store with two cheese slicers in her handbag and a kettle wrapped in a sweater. She was arrested for shoplifting.

The lawyer of some 27 years was found guilty in May 2001 and sentenced to two weeks' jail.

The prosecution appealed, claiming the sentence was inadequate as Ms Ong, then 51, was unrepentant and has insisted on a trial despite the overwhelming evidence against her, including having been caught red-handed.

Hearing the appeal, Chief Justice Yong Pung How said Ms Ong had rather foolishly claimed trial and doubled her sentence to four weeks.

Yesterday, Ms Ong was one of three lawyers who appeared before CJ Yong and two other judges to show cause why they should not be punished for engaging in unprofessional conduct.

The Chief Justice smiled as he said he could not hear Ms Ong's case because I'm the one who increased her sentence.

Justice Lai Siu Chiu then joined Judge of Appeal Chao Hick Tin and Justice Tan Lee Meng to hear Ms Ong's case.

They ruled that Ms Ong be struck off the rolls.

Earlier, the court struck off lawyer, Jayaram Bala Subramaniam, who was jailed for 39 months in 2002 for pocketing nearly $238,000 of clients' money. The court was told he had made restitution but $128,000 was still outstanding.

The money was intended to pay registration and stamp fees for properties the clients had bought. But Jayaram, who had been in the legal profession for more than 20 years and owned a law firm, cashed their cheques to settle his personal bills.

Ms Ong and Jayaram were denied practicing certificates after their convictions.

[44] That was in the context of Singapore. Here, the appellant was absent during the hearings before the IT and the DC. He was present before this court. And before this court too, the appellant was represented by counsel. In *Re Lim Kiap Khee; Law Society of Singapore v Lim Kiap Khee* [2001] 3 SLR 616, the respondent there was found guilty of both grossly improper conduct and misconduct unbefitting of an Advocate and Solicitor by the DC. The respondent was absent on all the hearings before the DC. In fact, the respondent was neither represented nor did he enter an appearance before the DC hearings and before the court of three judges.

[45] The Singapore High Court ordered that the respondent be struck off the Roll. The Singapore High Court referred to s 104 of the Legal Profession Act (Cap 161, 1994 Ed)which is similar to our s 109 of the LPA. The Singapore High Court had this to say at p 622 of the report:

Absence of the respondent

10 The DC heard the matter over four days, namely, on 5 October, 19 October, 29 November and 12 December 2000. At none of these hearings was the respondent present, nor was he represented by counsel, as he could not be contacted at either his last known residential or business address. The DC even inserted notices of the disciplinary hearings in both The Straits Times and The New Straits Times (Malaysia) to notify the respondent of the same. However, they were of no avail.

11 The only provision in the Act which touches on the question of service is s 104 and it reads:

> If the person whose conduct is the subject of inquiry fails to attend before the court, a Disciplinary Committee, the Council or the Inquiry Committee, as the case may be, the inquiry or proceedings may be proceeded with or without further notice to that person upon proof of service by affidavit or statutory declaration.

There was affidavit evidence before us showing the services effected on the respondent in relation to both the hearing before the DC as well as before us. It seemed to us that the respondent did not wish to partake in any disciplinary action which would be instituted against him. Thus, he was not present before us; nor was he represented by counsel to make submission on his behalf.

[46] Likewise here, there was the affidavit of Tomis Anak Peter Samat that was affirmed on 20 July 2005 as alluded to in this judgment and that affidavit can be seen in encl 12. In that affidavit there was evidence that the service of the notice of hearing was in fact effected on the appellant and that the appellant was also informed by way of a telephone conversation by the chairman of the IT of the date for hearing. There was also evidence in the form of the return of the AR card duly acknowledged as seen at p 24 of encl 12 accompanying the letter from the DC informing the appellant of the date for the hearing before the DC. Without a doubt, there was ample proof of service as alluded to in the affidavit in encl 12.

[47] It would not be out of place to reproduce s 109 of the LPA. It is worded as follows:

> If person inquired fails to attend
>
> If the person whose conduct is the subject of inquiry fails to attend before the court, [the Investigating Tribunal or the Disciplinary Committee], as the case may be, the inquiry or proceedings may be proceeded with without further notice to such person upon proof of service by affidavit or statutory declaration or in such other manner as the court may direct.

[48] And if proof was required, it would be the court that has to direct and decide. Drawing an analogy from the Singapore's case of *Chan Chow Wang v Law Society of Singapore* [1978–1979] 1 SLR 14, a decision of the Privy Council, it can be argued that the requirement of s 109 of the LPA would depend entirely on the discretion of the IT or the DC. If the IT or the DC was satisfied that due notice had been given to the appellant, it can dispense with such requirement. At any rate, even if proof was required, it would be that as required by this court and, in this regard, I must say and I so hold that the chronology of events as alluded to earlier together with the affidavit of Tomis anak Peter Samat in encl 12 would amply show that the notices of the hearings before the IT and the DC were indeed served on the appellant.

CONCLUSION

[49] It was the unanimous decision of this court that prayers (1) and (2) of encl 4 must be dismissed with costs and, consequently, we too unanimously dismissed the appeal in encl 1 forthwith.

[50] I have shown this judgment in draft to T Selventhiranathan and Mohd Hishamudin JJ and they have expressed their agreement with it.

Appeal in encl 1 dismissed.

Reported by Eugene Daniel Louis